BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The United States District Court for the Eastern District of Missouri, Eastern Division, entered an order denying the petition for a compromise of the RFC claim on November 16, 1942 (R. 10). The opinion of the Circuit Court of Appeals for the Eighth Circuit dismissing the appeals (R. 84-89) is reported in 134 F. (2d) 139.

Jurisdiction.

The orders of the Circuit Court of Appeals for the Eighth Circuit were entered on March 5, 1943 (R. 89-92). The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code (28 U. S. C. A. Sec. 347 (a) as amended by the Act of February 3, 1925, 43 Stat. 938).

Statement of the Case.

A summary statement of the facts is given in the petition, pages 3-5 above.

Statutes Involved.

The jurisdiction of appellate courts is regulated by the Act of June 22, 1938, c. 575, Sec. 1, 52 Stat. 854 (11 U. S. C. A. Sec. 47) which provides:

> "Jurisdiction of appellate courts.
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> a. The Circuit Courts of Appeals of the United States and the United States Court of Appeals for the District of Columbia, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankrupcty in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in

proceedings in bankruptcy, to review, affirm, revise or reverse, both in matters of law and in matters of fact: *Provided, however,* That the jurisdiction upon appeal from a judgment on a verdict rendered by a jury, shall extend to matters of law only: *Provided further,* That when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court.

b. Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal.

c. The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and orders of the Circuit Courts of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia in proceedings under this title in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted."

Specifications of Errors to be Urged.

1. The Circuit Court erred in dismissing the appeals from the order of the District Court.

2. The Circuit Court erred in holding that the petitioners herein did not have an interest entitling them to appeal from the order of the District Court.

3. The Circuit Court erred in not holding that the fact that the Trustee had taken an adverse position entitled the petitioners herein to appeal from the order of the District Court.

Summary of Argument.

I.

The petitioners herein are directly and adversely affected by the District Court's denial of the petition.

II.

An order of a District Court refusing to direct the Trustee to administer the estate economically may be appealed from by creditors and stockholders, particularly where the question of economical administration vitally affects their participation in the reorganization.

III.

Where the trustee has taken a position adverse to that of creditors and stockholders, they are entitled to take an appeal.

ARGUMENT.

I.

The petitioners herein are directly and adversely affected by the District Court's denial of the petition.

In dismissing the appeals the Circuit Court of Appeals for the Eighth Circuit found that the order of the District Court "does not directly adjudicate upon any claim of any creditor, secured or unsecured" and that "each creditor retains after the order the same claim it had before and the assets are unchanged." Such conclusions ignore the substance of petitioners' contention. It is, as in the *Fonda Railway* case *supra*, the refusal of the District Court to direct the effectuation of a saving in which the petitioners have a vital interest, that is the basis of their right to appeal. The fact that the appeals were taken from an order denying a payment out of the estate can of course make no difference; the question is not one of form, but of substance. As the Circuit Court of Appeals for the Second Circuit said in the *Fonda Railway* case, in answering the contention that the order there did not grant the

abandonment but refused it, and in holding that the motion to dismiss the appeal must be denied:

> "But it is seldom, if ever, that the right of appeal is made to depend upon whether an issue presented for decision is determined affirmatively or negatively. We cannot think Congress intended to cut so fine" (95 F. (2d) 397, 399).

In the *Fonda Railway* case the interest of the appellants was only that of bondholders interested in the economical operation of the trust estate; and there the debtor's trustee, instead of opposing the desire of the bondholders to effect economies, was in entire accord with them. Certainly the effectuation in the instant proceeding of an immediate saving of more than $4,600,000 of past interest and a future annual saving of $1,388,000 seems no less in either kind or degree than the saving to sustain which the Circuit Court of Appeals for the Second Circuit held that bondholders there had a right to appeal.

The petitioners herein are creditors and stockholders. Under the plan of reorganization approved by the Commission and the District Court,[5] stockholders are wiped out and these creditors receive only partial payment of their claims. The Convertible 5½% Bonds of the Debtor, of which some of the petitioners own and represent large amounts, receive under that plan for each $1,000 principal amount thereof and all unpaid interest thereon as of January 1, 1940, only 2.42 shares of no par value common stock.

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[5] On May 8, 1943, the Circuit Court of Appeals for the Eighth Circuit remanded the appeals then pending in that Court on the plan of reorganization to the District Court, which has ordered that a hearing be held before it to determine "whether (that plan of reorganization) shall be confirmed and to determine any and all other matters relevant thereto."

The new securities allocated to the RFC under the present plan of reorganization consist in the main of new fixed interest First Mortgage Bonds and represent over 7% of the total of $423,722,500 in reorganization securities which will be prior to the common stock that is the principal security allocated to all but one of the petitioners in respect of the indebtedness owed them (R. 45 and 239 I. C. C. 7, 155, end of Appendix E). Use by the Trustee of idle cash now on hand to repay the RFC loan would save annual charges prior to the common stock equivalent to dividends of more than $1 per share on the common stock of the reorganized company (ibid). This would justify a large and material increase in the amount of the common stock which could be made available in reorganization.

It is respectfully submitted that it is difficult to see how it can be contended that the petitioners are not directly and adversely affected by the refusal of the District Court to direct such a saving.

The foregoing relates only to the petitioners who are creditors. Some of the petitioners are holders of large amounts of stock of the Debtor and under the present plan are eliminated from any participation in the reorganized company. The only way in which present stockholders have a possibility of participating in the new capitalization proposed by the present plan is by the payment and elimination of prior claims. Accordingly, the payment of the RFC and underlying debt, or conversely, the refusal of the District Court to authorize such payment, may make all the difference between participation in the plan of reorganization and non-participation—all the difference between receiving something and nothing. It is not of course contended that the refusal to authorize such payments con-

stitutes a denial of the claim of the petitioners—as to which all the authorities agree there would be a right to appeal; but the result is the same.

Accordingly, it is respectfully submitted that the denial of the petition by the District Court directly and adversely affects the interest of the petitioning creditors and stockholders whose claims are junior to the RFC loan.

II.

An order of a District Court refusing to direct the trustee to administer the estate economically may be appealed from by creditors and stockholders, particularly where the question of economical administration vitally affects their participation in the reorganization.

Appeals by creditors and stockholders have been taken in numerous cases from orders of district courts approving compromises in bankruptcy and reorganization proceedings.

Pullman Couch Co. v. *Eshelman*, 1 F. (2d) 885 (C. C. A. 4, 1924);

Drexel v. *Loomis*, 35 F. (2d) 800 (C. C. A. 8, 1929);

Hair v. *Byers*, 92 F. (2d) 684 (C. C. A. 5, 1937);

Scott v. *Jones*, 118 F. (2d) 30 (C. C. A. 10, 1941).

Similarly, appeals were taken by creditors and stockholders from compromises in equity receivership cases.

West v. *Radio-Keith-Orpheum Corp.*, 68 F. (2d) 869 (C. C. A. 2, 1934);

McDonald v. *Aetna Indemnity Company*, 92 Atl. 154 (Sup. Ct. of Errors of Conn., 1914);

Gerdes, Corporate Reorganization, Vol. 2, p. 1223.

Creditors and stockholders in bankruptcy and reorganization proceedings have also been permitted to appeal from various other orders of district courts for the purpose of furthering a sound and economical administration of the estate. See *supra In re Fonda, J. & G. R. Co.; Van Schaick* v. *McCarthy; In re Irving-Austin Building Corp.;* and *Bankers Trust Co.* v. *Henwood.*

Although the District Court refused to authorize the compromise here on the basis of its not being "in the interest of the trust estate and of the creditors" (R. 18), the Circuit Court of Appeals held that the creditor and stockholder petitioners herein have no appealable interest; that "such general interest is (the Debtor's Trustee's) interest and not the interest of the individual creditors or the Debtor or its stockholders." In reaching this conclusion the Court relied upon decisions holding that creditors have no standing to appeal from orders of District Courts allowing the claims of other creditors.[6] It is submitted, however, that this principle is not applicable to appeals from the granting or denying of a compromise of the claim of another creditor, particularly in Chapter X or Section 77 reorganization proceedings. (*In re Keystone Realty Holding Company, supra.*)

While the two other decisions relied upon by the Circuit Court in the instant case support the decision of that court (except for the important distinction discussed in Point III below), *Amick* v. *Mortgage Security Corp.* and *In re West-*

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[6] *Chatfield* v. *O'Dwyer,* 101 F. 797 (C. C. A. 8, 1900); *Jonas* v. *Bellerive Inv. Co.,* 90 F. (2d) 688 (C. C. A. 8, 1937); *Foreman* v. *Burleigh,* 109 F. 313 (C. C. A. 1, 1901); *In re Lewensohn,* 121 F. 538 (C. C. A. 2, 1903); *In re Chakos,* 24 F. (2d) 482 (C. C. A. 7, 1928).

ern Pacific R. R. Co., supra, those decisions only increase the confusion and emphasize the conflict between the Circuit Courts as to the right of creditors and stockholders to appeal from orders (except orders allowing claims of other creditors) entered by the District Courts in bankruptcy and reorganization proceedings.

III.

Where the trustee has taken a position adverse to that of creditors and stockholders, they are entitled to take an appeal.

But even assuming *arguendo* that the decisions in the *Amick* and *Western Pacific* cases are correct in the ordinary situation and that the *Keystone, Dana, Eshelman* and *Fonda* decisions are erroneous, the petitioners herein are entitled to appeal.

The Trustee in this proceeding has taken a position on the merits opposed to the petitioners and has been active in opposition, filing an answer requesting the denial of the petition (R. 59). By thus taking a position adverse to our contentions, his sincerity not being questioned, the Trustee has effectively barred himself from exercising an election to appeal in behalf of these petitioners. Certainly after having successfully opposed the petition, the Trustee could not appeal from a decision in his favor. Accordingly, the only avenue of appeal now lies through one or all of the parties whom the Trustee has opposed.

This contention was strenuously argued before the Circuit Court by the petitioners herein, but the Circuit Court did not feel that this fact was of sufficient importance even to justify mention. The Circuit Court completely ignored

the recognition of this principle in *Christian* v. *Hoe & Co., Inc.*, 79 F. (2d) 541 (1935), where the Circuit Court of Appeals for the Second Circuit, while holding that creditors and stockholders generally have no right to appeal from allowance orders, distinguished the situation where the order appealed from was one where the debtor's trustee was in an adverse position, saying:

> "But that rule does not apply to the allowance of the trustee itself, or to that of its attorneys; obviously the trustee would not appeal from these * * * We assume without deciding that in so far as the trustee and its attorneys were awarded anything for services rendered in the proceeding as distinct from the suit, no leave to appeal was necessary" (pp. 541-2).

It is thus clearly recognized that where the position of the trustee is opposed to that of creditors or stockholders, such creditors or stockholders have the right to appeal. The decision of the Circuit Court was erroneous in that it failed to recognize this important principle. Thus, even assuming that the *Amick* and *Western Pacific* cases are correct, they are not controlling in this situation for in neither of those cases had the trustee aken an adverse position.

If the decisions of the Second, Third and Fourth Circuits in the *Fonda, Dana, Keystone* and *Eshelman* cases are correct, *a fortiori* when the Trustee has taken a position which is adverse to that of the creditors, those creditors have the right to appeal from the orders of the District Court.

Conclusion.

This cause involves federal questions of first importance which should be reviewed and settled by this Court and writs

of certiorari should issue for that purpose,[7] as prayed in the foregoing petition.

Dated June 3, 1943.

Respectfuly submitted,

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[7] The importance of procedural questions of less scope and significance in connection with the right to appeal in reorganization proceedings under the Bankruptcy Act has recently been clearly recognized by this Court in *Dickinson Industrial Site* v. *Cowan*, 309 U. S. 382 (1940). There this Court granted certiorari on the question whether an appeal could be taken as of right from a decision which made an allowance of only $10,000—expressly on the basis of a conflict with a ruling of another Circuit Court of Appeals which held that appeals can be taken as of right under the Chandler Act from compensation orders involving $500 or more.